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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VIVIAN THOMPSON,) No. CV 02-6793-JTL
)
Plaintiff,)
) ORDER AWARDING ATTORNEY FEES
v.) PURSUANT TO 42 U.S.C. § 406(b)
)
)
JO ANNE B. BARNHART,)
)
Commissioner of the Social)
Security Administration,)
)
Defendant.)
_____)

BACKGROUND

On or about September 5, 2002, plaintiff filed a Complaint challenging the Commissioner's decision denying her application for social security benefits. On November 4, 2002, the parties filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. Thereafter, on January 21, 2003, defendant filed an Answer to Complaint. On May 19, 2003, the parties submitted a Stipulation for Remand, in which they agreed that this matter should be remanded pursuant to Sentence Four of 42 U.S.C. § 405(g). Pursuant to the Stipulation, the parties agreed that the Administrative Law Judge

1 ("ALJ") would obtain plaintiff's subsequent claim file containing a
2 favorable determination on a September 13, 2002 application for
3 benefits; consider the evidence; determine what effect, if any, such
4 evidence has on the instance case; and determine whether resolution of
5 the evidence in the instant case and the subsequent claim file is
6 possible. On remand, the Commissioner awarded plaintiff approximately
7 \$44,955.00 in retroactive benefits pursuant to Title XVI of the Social
8 Security Act.

9 Counsel for plaintiff now requests that the court issue an order
10 pursuant to 42 U.S.C. § 406(b) awarding him attorney's fees in the
11 amount of \$7,500.00 pursuant to his contingency fee contract.¹ The
12 requested fee is based on 5.8 hours of attorney time and 7.5 hours of
13 paralegal time before the district court. (Motion at 3). The
14 Commissioner states that she takes no position as to the
15 reasonableness of the fee request.

16 Based upon a review and consideration of the pleadings filed by
17 the parties in connection with plaintiff's Amended Petition for
18 Attorney Fees Pursuant to 42 U.S.C. § 406(b), the Court finds that
19 \$7,500.00 for 5.8 hours of attorney time and 7.5 hours of paralegal
20 work is not reasonable. For the reasons stated below, the Court
21 concludes that a fee of \$5,883.21 is reasonable.²

22 ///

23 ///

25 ¹ On June 9, 2003, counsel was awarded attorneys fees under the
26 Equal Access to Justice Act ("EAJA") in the amount of \$1,500.00
27 pursuant to a stipulation with the Commissioner. Counsel agrees to
reimburse the \$1,500.00 to plaintiff.

28 ² Of the \$5,883.21, counsel will return \$1,500.00 to plaintiff
for EAJA fees already paid.

DISCUSSION

Title 42, United States Code, Section 406(b), provides, in relevant part:

Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

In Gisbrecht v. Barnhart, 535 U.S. 789 (2002), the Court resolved a split in the circuits regarding how to calculate attorneys' fees under Section 406(b). In rejecting the "lodestar method," under which the number of hours reasonably devoted to each case was multiplied by a reasonable hourly fee,³ the Court concluded that:

[Section] 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases. Congress has provided one boundary line: Agreements are unenforceable to the extent that they provide for fees exceeding 25 percent of the past-due

³ Gisbrecht, 535 U.S. at 797-98.

benefits. [Cite omitted]. Within the 25 percent boundary, as petitioners in this case acknowledge, the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered.

Gisbrecht, 535 U.S. at 807.

Moreover, courts that approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness, have appropriately reduced the attorney's recovery based on such factors as the character of the representation and the results the representative achieved; whether the attorney was responsible for any delay of the progress of the case in court; and whether the benefits are excessive in comparison to the amount of time counsel spent on the case. Id. at 808.

Here, under the terms of the contingency fee agreement to which plaintiff agreed, plaintiff agreed that counsel could receive 25% of the backpay awarded upon reversal of any unfavorable ALJ decision for work before the Court.⁴ (Petition, Exh. 1). Thus, the agreement provides for a fee that falls within the acceptable range as specified in Section 406(b). Furthermore, there is no assertion that the contingency fee agreement itself is invalid. There is also no evidence that plaintiff's counsel was responsible for any delay in the Court's proceedings.

Although the contingency agreement should be given significant weight in fixing a fee, a district judge must independently assess the

⁴ Counsel's fee request of \$7,500.00 already represents a reduction from \$11,238.75, or 25 percent of \$44,955.00, that he is entitled to under the terms of the agreement.

1 reasonableness of its terms. McGuire v. Sullivan, 873 F.2d 974, 983
2 (7th Cir. 1989). As an aid to assess the reasonableness of counsel's
3 fee pursuant to the terms of the contingency fee agreement, the Court
4 has reviewed the record summarizing the time plaintiff's counsel and
5 paralegal spent working on this case. See Gisbrecht, 535 U.S. at 808-
6 09. (See Amended Petition, Exh. 4).

7 Based on the information provided by plaintiff, the average
8 hourly rate in 2000 that a partner in a small law firm (12 or less
9 attorneys) in California charged was \$250.00. The hourly rate for an
10 associate in a small law firm was \$171.00, and the hourly rate for
11 paralegals was \$86.00. The upper 10% of hourly rates that were
12 charged in the year 2000 consisted of \$336.00 for partners, \$250.00
13 for associates, and \$120.00 for paralegals. When allowing for
14 inflation since January of 2000, the hourly rates for the upper decile
15 are \$396.51 for partners, \$295.02 for associates, and \$141.61 for
16 paralegals. Counsel for plaintiff contends that the Court should
17 assess the reasonableness of the fee request based on these figures.
18 Counsel also notes that the enhancement of approximately 2.73 is
19 necessary to compensate for the risk that contingency lawyers take.
20 In the instant case, counsel requests an enhancement of 2.29. Counsel
21 further recommends that the Court consider the multiplier received by
22 contingency attorneys in class action securities litigation as a guide
23 and cites to cases where courts awarded fees with multipliers ranging
24 from three to four. Due to the dearth of attorneys willing to handle
25 appeals, counsel for plaintiff also argues that its firm has been
26 responsible for filing thirty to forty percent of the complaints in
27 Social Security cases in this district. Furthermore, counsel for
28 plaintiff argues that he has worked on this case for three years on a

1 pure contingency basis with a risk of no payment. Thus, in light of
2 all these factors, plaintiff's contends that the fees sought are
3 reasonable and appropriate.

4 Taking into account such factors as the experience of counsel and
5 the inherent risk in the contingent nature of these cases, this Court
6 finds that a fee award of \$7,500.00, which would *de facto* be applying
7 an attorney hourly rate of \$906.22 and a paralegal hourly rate of
8 \$299.19, is excessive and unreasonable. Unlike other cases where
9 plaintiff could argue that there was a substantial risk of loss from
10 the beginning, there is nothing to suggest that there was a
11 significant risk of loss in this particular case. In fact,
12 plaintiff's counsel does not make this argument. Instead, counsel
13 presents general statistics regarding the overall chance of success
14 that social security claimants have in court. The Court does not take
15 issue with the reasonableness of the 13.3 hours that counsel and his
16 paralegal have billed in this case. In contrast to the approximately
17 \$44,955.00 that plaintiff received in back benefits, however, the
18 concern that counsel not receive a windfall is one of which this Court
19 is mindful. See Gisbrecht, 535 U.S. at 808; Hearn, 262 F. Supp. 2d at
20 1033. Thus, based upon the factors discussed above, the Court
21 concludes that a total attorney fee award of \$5,883.21 is reasonable.
22 This amount applies a 1.75 multiplier to counsel's normal fee of
23 \$396.51 per hour and the paralegal's fee of \$141.61.⁵ See McGuire, 873
24 F.2d at 983-84 (in support of the award, the court took into
25 consideration the skill, experience and reputation of [the attorney],
26

27 ⁵ Using a multiplier of 1.75, counsel's fees amount to
28 \$4,024.58 (\$693.89 x 5.8 hours) and the paralegal's fees amount to
\$1,858.63 (\$247.81 x 7.5 hours).

1 the difficulties of the case, as well as the successful result
2 obtained).

3
4 **CONCLUSION**

5 Based upon the foregoing, plaintiff's Motion for Attorney's Fees
6 is GRANTED IN PART and gross fees in the sum of \$5,883.21 are hereby
7 awarded. Upon payment by the Commissioner of the balance of counsel's
8 fees, plaintiff's counsel shall refund to plaintiff the amount of
9 \$1,500.00 for fees previously paid.

10 DATED: November 8, 2006

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JENNIFER LUM
13 UNITED STATES MAGISTRATE JUDGE
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